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Rene M. LaForte
University of Dayton

THE CONSTITUTIONAL IMPLICATIONS OF ANTI-DRUG LOITERING ORDINANCES IN OHIO

I. INTRODUCTION

The Tenth Amendment to the United States Constitution reserves to the states the authority to regulate individual conduct through their police power.[1] In turn, each respective state constitution delegates power to local governing bodies to enact local ordinances.[2] Loitering laws are prime examples of such local ordinances.

Spurred by the increasing drug problem in our nation's cities, local legislatures and officials searched for stronger law enforcement tools.[3] One measure by which local municipalities can prevent illegal drug activity on their city streets is to provide law enforcement officials with the means to arrest individuals before the drug transaction actually takes place. By providing police officers with an ordinance by which they may arrest individuals simply for "loitering with the intent to engage in unlawful drug activity," municipalities attempt to curb street sales by reprimanding the actor prior to any exchange. The actor may be prosecuted even if the arrest does not produce any evidence of a controlled substance. Moreover, the police officer does not actually need to observe or prove the existence of an illegal substance.

Although anti-drug loitering ordinances purport to benefit the community by curbing illegal drug activity, they may also lend themselves to abuse. Such ordinances afford police officers an enormous degree of discretion in determining whether an individual manifests an intent to engage in unlawful drug activity.[4] Given such broad discre-

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1. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

2. For example, Article XVIII, Section 3 of the Ohio Constitution provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." OHIO CONST. art. XVIII, § 3.

3. An Ohio appeals court recently recognized the local police force's needs for strengthened law enforcement tools to combat the drug epidemic in *Akron v. Holley*. The court stated:

> (I)Illegal drug use in Akron has increased to an alarming level, and the number of drug-related arrests has sky-rocketed. To date, most of the increase is caused by the influx of crack cocaine. The level of other crime has also increased, particularly violent crime. Much of this is believed to be drug related.

Akron v. Holley, 557 N.E.2d 861, 863 (Ohio Mun. Ct. 1989).

4. See *infra* notes 31-97 and accompanying text for a discussion of the void for vagueness doctrine and police discretion under anti-drug loitering ordinances.

tion, police officers may unjustifiably interfere with an individual's constitutionally recognized right to be left alone and to be free from unreasonable police interference.[5] Thus, when enacting and enforcing anti-drug loitering ordinances, local officials must be careful to confine the scope of the ordinance to constitutional mandates.

This Comment provides a brief background of the origin and recent adoption of anti-drug loitering ordinances in Ohio. Next, it explores the two main constitutional attacks levied against the facial validity of Ohio's anti-drug loitering ordinances. These attacks are void for vagueness and overbreadth. Finally, this Comment illustrates the law enforcement implications that result as a consequence of the interpretations of these loitering ordinances.

II. BACKGROUND

The idea of an anti-drug loitering ordinance appears to have originated from Robert Bounds, a Yakima, Washington prosecutor.[6] In drafting Yakima's anti-drug loitering ordinance, Bounds looked to the Washington Supreme Court's decision in *Seattle v. Drew*.[7] Although

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5. These constitutional mandates are grounded in the Fourth Amendment's prohibition against unreasonable searches and seizures. First, the Fourth Amendment includes "the right to be let alone" from government interference. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). With regard to police-citizen street encounters, this right can be enjoyed only if officer discretion is adequately checked and officers are prevented from possessing a "dictatorial power over the streets." Anthony Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 222 (1967). Second, the Fourth Amendment protects individual security and affords the individual the right to be free from unreasonable police interference. U.S. CONST. amend. IV. The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." *Id.* Along with the constitutionally recognized right to travel, the Fourth Amendment provides the individual on the street with protection against unreasonable police interference. For example, in *Shapiro v. Thompson*, the Supreme Court stated:

> This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

394 U.S. 618, 629 (1969).

6. *See* National Institute of Municipal Law Organization's (NIMLO) Model Ordinance, Editor's Note, at 1 n.1. In 1988, Bounds became increasingly aware of Yakima's drug problem and sought the help of the Yakima Police Department in the hope of finding a solution. Robert Bounds, Memo re: Proposed Anti-Drug Loitering Ordinance (May 4, 1988) (on file with the *University of Dayton Law Review*). It was here that police sergeant Douglas Bronson made a remark to the effect that it was too bad that Yakima did not have an ordinance similar to the anti-prostitution loitering ordinance that would outlaw loitering for drug purposes. *Id.* Intrigued by this idea, Bounds met with other law enforcement officials and attorneys and began to draft a proposal.

7. 423 P.2d 522 (Wash. 1967). In *Seattle v. Drew*, the court struck down a Seattle ordinance that made it a crime for a person to loiter at night "under other suspicious circumstances" and "to fail to give a satisfactory account of himself" *Id.* at 523. The *Drew* court deemed this

the *Drew* court struck down Seattle's loitering ordinance on vagueness grounds, it recognized the need for and the importance of properly drafted loitering ordinances.[8] In doing so, the *Drew* court took the time to formulate guidelines for permissible loitering ordinances. The *Drew* court endorsed and recommended the adoption of the Proposed Official Draft of the Model Penal Code.[9] The Proposed Draft states:

> A person commits a violation if he loiters . . . in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor . . . at the time, would have dispelled the alarm.[10]

Following these recommendations, the City of Seattle subsequently enacted an ordinance which penalized loitering for the purpose of prostitution.[11] This particular ordinance was challenged and subsequently

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language too vague and held that it granted the police too much discretion. *Id.* at 526. At the heart of the decision in *Drew* was the notion that Seattle's ordinance criminalized conduct which did not in itself manifest an unlawful purpose.

8. *Id.* As the court stated: "The importance of loitering ordinances cannot be minimized. They are necessary for the protection of society and for the preservation of the public peace. They must, however, be drafted in a manner that protects the rights of the individual as well as the rights of the public." *Id.*

9. *Id.*

10. MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962).

11. Seattle, Wash., City Code § 12.49.010(g) made it unlawful

> [t]o loiter in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution. Among the circumstances that may be considered in determining whether such purpose is manifested: that such person is a known prostitute or panderer, repeatedly beckons to, stops or attempts to stop, or engages male passers-by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waiving of arms or any other bodily gesture. No arrest shall be made for a violation of this subsection unless the arresting officer first affords such person an opportunity to explain such conduct, and no one shall be convicted of violating this subsection if it appears at trial that the explanation given was true and disclosed a lawful purpose.

Seattle v. Jones, 488 P.2d 750, 751 (Wash. 1971) (quoting SEATTLE, WASH., CITY CODE § 12.49.010(g)).

upheld in *Seattle v. Jones*.[12] The court emphasized that loitering ordinances are valid when they are predicated on conduct that discloses a specific, illegal purpose or intent.[13] The specific, illegal purpose or intent in the Yakima ordinance was to engage in unlawful prostitution. Thus, although "loitering" by itself cannot be criminalized, "loitering with the intent to engage in unlawful activity" can be criminalized.

It was against this background that Yakima Prosecutor Bounds drafted an anti-drug loitering ordinance proposal. This anti-drug loitering ordinance[14] was patterned almost identically after the anti-prostitution loitering ordinance. The proposed ordinance explicitly required that the actor manifest the intent to engage in drug-related activity.[15] The Yakima City Council approved the ordinance in May of 1988.

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12. 488 P.2d 750 (Wash. 1971). In *Jones*, the Supreme Court of Washington acknowledged that Seattle's anti-prostitution loitering ordinance followed the Model Penal Code as was originally suggested in *Seattle v. Drew*. *Id.* at 753.

13. *Id.* at 752.

14. Presently YAKIMA, WASH., MUN. CODE § 6.04.540.

15. *Id.* The ordinance specifically provided as follows:

6.04.540 *Loitering for the Purpose of Engaging in Drug-Related Activity.*

A. It is unlawful for any person to loiter in or near any thoroughfare, place open to the public or near circumstances manifesting the purpose to engage in drug-related activity contrary to any of the provisions of chapters 69.41, 69.50 or 69.52 of the Revised Code of Washington.

B. No arrest shall be made for a violation of this section unless the arresting officer first affords such person an opportunity to explain such conduct, and no person shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose.

C. Included among the circumstances which may be considered in determining whether such purpose is manifested, but not limited thereto, are:

1. Such person is a known, unlawful drug user, possessor, or seller;

2. It is known that such person has been convicted in any court within this state within a period of two years of any violation involving the use, possession or sale of any of the substances referred to in chapter 69.41, 69.50 or 69.52 of the Revised Code of Washington, or, within two years, such person has been convicted of any violation of any of the provisions of said chapters of the Revised Code of Washington;

3. The area involved is by public repute known to be an area of unlawful drug use and trafficking;

4. The premises involved are known to have been reported to law enforcement as a place suspected of drug activity pursuant to chapter 69.52 of the Revised Code of Washington;

5. Any vehicle involved is known to be registered to a known unlawful drug user, possessor, or seller or for which there is an outstanding warrant for a crime involving drug-related activity;

6. Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is then engaged in an unlawful drug-related activity;

7. Such person takes flight upon the appearance of a police officer;

8. Such person manifestly endeavors to conceal himself or herself or any object that reasonably could be involved in an unlawful drug-related activity;

Since its adoption in 1988, many other local municipalities have enacted similar anti-drug loitering ordinances.[16] These anti-drug loitering ordinances were modeled upon both the Yakima ordinance[17] as well as the municipalities' respective anti-prostitution loitering ordinances.

In their most general sense, the anti-drug loitering ordinances in Ohio contain three distinct subsections. The first section typically provides the general prohibition against loitering with the intent to engage in illegal drug activity.[18] The second section usually contains a "list of circumstances" that may be considered by a police officer in determining whether the appropriate "purpose" or "intent" element exists.[19]

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9. Such person refuses to identify himself or herself upon the request of an identified police officer.

16. *See, e.g.*, Sanford, Fla., Ordinance 2032 (May 22, 1989); Joliet, Ill., Ordinance 94-24 (Dec. 4, 1990); North Las Vegas, Nev., Ordinance 907 (Sept. 21, 1988); Dayton, Ohio, Ordinance 28107 (May 9, 1990); Akron, Ohio, Ordinance 519-1989 (June 26, 1989); Cleveland, Ohio, Ordinance 582-A-89 (June 19, 1989); Tacoma, Wash., Ordinance 24167 (Aug. 16, 1988).

17. *See supra* note 15 and accompanying text.

18. For example, Dayton, Ohio's Ordinance 28107 provides:

> (A) No person shall loiter either on foot or in a motor vehicle or on, or in any other means of conveyance or transportation, on or about any highway, road, street, thoroughfare, alley, sidewalk, or other public place and/or on or about any place which is open to the public in a manner and under circumstances manifesting the purpose of soliciting another person to purchase, obtain, sell, transfer, use, or otherwise possess any drug of abuse, controlled substances or dangerous drug.

Id.

19. For example, Dayton, Ohio's Ordinance 28107 provides:

> Circumstances which may be considered in determining whether such purpose is manifested may include, but are not limited to the following:
>
> (1) The person is a known illegal user, possessor, or seller of controlled substances or narcotics or drugs, or the person is at a location(s) frequented by persons who illegally use, possess, transfer, or sell controlled substances or narcotics or drugs;
>
> (2) That such person repeatedly beckons to, stops or attempts to stop, or engages persons in conversation; or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture, or repeatedly approaches a stationary motor vehicle(s) or repeatedly attempts to engage occupants of a stationary motor vehicle(s) in conversation; or if operating a motor vehicle or other means of transportation, the person stops or attempts to entice others to or into the motor vehicle and/or other means of transportation;

Id. The "list of circumstances" that may be considered by law enforcement officials may vary substantially from city to city. Akron, Ohio's Ordinance 519-1989, "Loitering for the Purpose of Engaging in Drug-Related Activity," provides an example of the degree of variety that can be employed in these ordinances:

> (B) Among the circumstances which may be considered in determining whether such purpose is manifested are:
>
> (1) Such person is a known unlawful drug user, possessor, or seller. For purposes of this chapter, a 'known unlawful drug user, possessor, or seller' is a person who has, within the knowledge of the arresting officer, been convicted in any court within this state of any violation involving the use, possession, or sale of any controlled substance as defined in Chapter 2925 of the Ohio Revised Code, or such person has been convicted of any violation of any of the provisions of said Chapter of the Ohio Revised Code or substantially similar laws of any political subdivision of this state

The third section of a typical anti-drug loitering ordinance contains a provision that requires the arresting officer to first afford the actor an opportunity to explain his conduct. If the actor provides a "satisfactory explanation" to the police officer that "discloses a lawful purpose, the actor should not be prosecuted and/or convicted under the ordinance."[20]

III. ANALYSIS

Article XVIII, Section 3 of the Ohio Constitution grants authority to Ohio municipalities to adopt and enforce local police regulations within their jurisdictions.[21] Any such local legislation, however, must have a real and substantial relationship to the public peace, health,

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or of any other state; or a person who displays physical characteristics of drug intoxication, or usage, such as "needle tracks," burned or calloused thumb and index fingers, underweight, nervous and excited behavior;

(2) Such person is currently subject to a court order prohibiting his presence in a high drug activity geographic area;

(3) Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is then engaged in an unlawful drug-related activity, including by way of example only, such person acting as a "lookout" or hailing or stopping cars;

(4) Such person is physically identified by the officer as a member of a "gang" or association which has as its purpose illegal drug activity;

(5) Such person transfers small objects or packages in a furtive fashion;

(6) Such person takes flight or manifestly endeavors to conceal himself upon the appearance of a police officer;

(7) Such person manifestly endeavors to conceal any object which reasonably could be involved in an unlawful drug-related activity;

(8) Such person possesses any instrument, article, or thing whose customary or primary purpose is for the sale, administration or use of controlled substances such as, but not limited to, crack pipes, push wires, chore boys, hand scales, hypodermic needles, razor blades, or other cutting tools;

(9) The area involved is by public repute known to be an area of unlawful drug use and trafficking;

(10) The premises involved are known to the defendant to have been reported to law enforcement as a place of drug activity pursuant to Chapter 2925 of the Ohio Revised Code;

(11) Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

City of Akron v. Rowland, C.A. No. 15307, 1992 Ohio App. LEXIS 1870, at *3-*5 (9th App. Dist. Apr. 8, 1992) (quoting Akron, Ohio, Ordinance 519-1989 (June 26, 1989)).

20. For example, Dayton, Ohio's Ordinance 28107 provides:

(B) No arrest shall be made for a violation of this section unless the arresting officer first affords such person an opportunity to explain such conduct; and no one shall be convicted of violating this section if it appears at trial that the explanation was true and disclosed a lawful purpose.

Dayton, Ohio, Ordinance 28107 (May 9, 1990).

21. *See supra* note 2 for the text of this provision.

safety, or morals.[22] Local ordinances do not conflict with limited United States or Ohio Constitutional guarantees if such ordinances are not arbitrary, capricious, or unreasonable.[23]

There is a strong presumption of constitutionality with regard to local legislative enactments.[24] Additionally, since local governments are the most familiar with the problems unique to their communities, courts give great deference to local legislation.[25] The necessity of a court adhering to such a presumption is to prohibit one branch of state government from encroaching on the duties and prerogatives of another.[26] Thus, courts attempt to avoid an unconstitutional construction of local legislation if it is reasonably possible to do so.[27]

This strong presumption is rebuttable, however, but only by proving the existence of the constitutional infirmity "beyond a reasonable

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22. Cleveland v. Raffa, 235 N.E.2d 138, 141 (Ohio), *cert. denied*, 393 U.S. 927 (1968) (local liquor ordinance considered a valid exercise of the municipality's police power since it bears a real and substantial relationship to the health, safety, morals and general welfare of the public); Benjamin v. Columbus, 146 N.E.2d 854, 864 (Ohio 1957), *cert. denied*, 357 U.S. 904 (1958) (exercise of police power interfering with enjoyment of liberty will nevertheless be valid if it bears a real and substantial relationship to public health, safety, morals or general welfare and it is not unreasonable or arbitrary).

23. *See* Kelly v. Johnson, 425 U.S. 238, 247-49 (1976) (county regulation limiting the length of county policemen's hair held not to violate any constitutional right of the respondent since respondent failed to demonstrate the lack of a rational connection between the regulation and the promotion of safety of persons and property); Cincinnati v. Correll, 49 N.E.2d 412, 416 (Ohio 1943) (city ordinance prohibiting operation of barber shops at certain hours is not a constitutional exercise of the police power and is invalid as arbitrary, discriminatory and unreasonable).

24. American Cancer Society, Inc. v. Dayton, 114 N.E.2d 219, 253 (Ohio 1953) ("[C]ourts must always indulge a strong presumption in favor of the constitutionality of legislation . . . and will not pass upon the constitutionality of a statute or ordinance unless or until it becomes necessary to do so in order to dispose of the case before it."); State *ex rel.* Lourin v. Industrial Comm'n, 37 N.E.2d 595, 596 (Ohio 1941), *rev'd*, 473 N.E.2d 818 (Ohio 1984) (refusing to invalidate a plan of classification adopted by the legislature unless clearly arbitrary and unreasonable); Xenia v. Schmidt, 130 N.E. 24 (Ohio 1920) (legislative act is presumed in law to be within the constitutional power of the body making it, whether that body be a municipal or a state legislative body); *see also* State v. Renalist, Inc., 383 N.E.2d 892 (Ohio 1978); State *ex rel.* Jackman v. Court of Common Pleas of Cuyahoga County, 224 N.E.2d 906 (Ohio 1967); State *ex rel.* Dickman v. Defenbacher, 128 N.E.2d 59 (Ohio 1955).

25. Allion v. Toledo, 124 N.E. 237, 237 (Ohio 1919) ("Unless there is a clear and palpable abuse of power the court will not substitute its judgment for legislative discretion."); *see also* State v. Sawyer, 346 So. 2d 1071, 1072 (Fla. Dist. Ct. App.), *cert. denied*, 353 So. 2d 678 (Fla. 1977), *and cert. denied*, 436 U.S. 914 (1978) ("[C]ourts should be very cautious in declaring a municipal ordinance unreasonable, there being a peculiar propriety in permitting the inhabitants of a city, through its officials, to determine what rules are necessary for their own local government.").

26. 16 AM. JUR. 2D *Constitutional Law* § 213 (1979).

27. *See* United Air Lines v. Porterfield, 276 N.E.2d 629, 632 (Ohio 1971), *appeal dismissed for want of substantial federal question*, 407 U.S. 917 (1972); Bedford Heights v. Tallanco, 267 N.E.2d 802, 803 (Ohio 1971); Schneider v. Laffoon, 212 N.E.2d 801, 806 (Ohio 1965); Co-Operative Legislative Comm. of Transp. Bhds. v. PUCO, 202 N.E.2d 699, 701 (Ohio 1964).

doubt."[28] Despite this strong burden, many people have challenged the new Ohio anti-drug loitering ordinances on constitutional grounds. The two major constitutional challenges are vagueness[29] and overbreadth.[30] Although the Ohio courts have generally upheld such legislation, it is important to explore each type of challenge in order to recognize the constitutional limitations that courts place upon the interpretation and application of such ordinances.

A. Void for Vagueness

The void for vagueness doctrine originates from the basic due process principle that enactments which prohibit certain conduct must be clearly defined.[31]

> The doctrine embodies the constitutional requirement of definiteness [which] is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the state. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.[32]

In *State v. Norman*,[33] the Ohio Supreme Court articulated the importance of clearly defined laws. In *Norman*, the court stated that vague laws offend important values. Specifically, the court noted:

> [b]ecause we assume man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Secondly, if arbitrary and discriminatory enforcement is to be

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28. *Defenbacher*, 128 N.E.2d at 67. "Furthermore, when an enactment under attack is a legislative exercise pursuant to the police power, a party opposing such action must demonstrate a clear and palpable abuse of that power in order for a reviewing court to substitute the court's own judgment for legislative discretion." *Renalist*, 383 N.E.2d at 894 (citing *Allion*, 124 N.E. at 237); *see also* Miami County v. Dayton, 110 N.E. 726, 728 (Ohio 1915).

29. *See infra* notes 31-97 and accompanying text.

30. *See infra* notes 98-126 and accompanying text.

31. *See generally* United States v. Harriss, 347 U.S. 612 (1954). Under the Due Process Clause of the Fifth and Fourteenth Amendments, life, liberty, and property cannot be taken by virtue of a statute or ordinance whose terms are "so vague, indefinite and uncertain" that one cannot determine their meaning. Lanzetta v. New Jersey, 306 U.S. 451, 458 (1938) (reversing conviction under statute making it a penal offense to be a "gangster").

32. *Harriss*, 347 U.S. at 617.

33. 441 N.E.2d 292 (Ohio 1981). In *Norman*, a dealer in gold, silver, diamonds, jewelry, and stamps appealed from a municipal court's decision finding him guilty of violating a statute governing the duty of dealers in secondhand articles to keep records of purchases available for reasonable inspection by law enforcement authorities. *Id.* Specifically, Norman contended that the statutory terms "secondhand articles of any kind" and "old metal" were too vague and thus could not be understood by a person of ordinary intelligence to give fair notice that his contemplated conduct was forbidden by the law. *Id.* at 294.

> prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application.[34]

In order to guard against the vices of vague laws, due process imposes a two part test on criminal ordinances. First, the enactment must be sufficiently definite to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden under its terms.[35] Second, the enactment must provide explicit standards for those who enforce it so as to avoid resolution on an *ad hoc* or subjective basis. The second part of the test seeks to avoid the dangers of arbitrary and discriminatory application of the law.[36]

1. First Prong: Fair Notice

In *Connally v. General Construction Company*,[37] the United States Supreme Court indicated that a law is facially void if it is so vague that "persons of common intelligence must necessarily guess at its meaning and differ as to its application".[38] In 1971, in *Coates v. City of Cincinnati*,[39] a city ordinance made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ."[40] In striking down the congregation statute as unconstitutionally vague, the *Coates* Court stated that it unlawfully subjects the

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34. *Id.* at 294 (citations omitted).

35. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); *Harriss*, 347 U.S. at 617; *see also* Winters v. New York, 333 U.S. 507 (1948).

36. *See* Edwards v. South Carolina, 372 U.S. 229 (1963).

37. 269 U.S. 385 (1926).

38. *Id.* at 388. *Connally* involved a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of section 7255 and section 7257 of the Compiled Oklahoma Statutes. *Id.* Section 7255 created an eight-hour day for all persons employed by or on behalf of the state and provided "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers . . . ." *Id.* Section 7257 imposed a fine of not less than fifty nor more than five hundred dollars or imprisonment for not less than three nor more than six months for any violation of this section. *Id.* In striking down the validity of the statute, the Court noted that the specific words "current rate of wages" did not "denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc. . . . ." *Id.* at 393. Because of the ambiguity in the text and the lack of clear and precise legislative intent, the statute was held to be void for vagueness. *Id.* at 395. As the Court stated, "[p]enal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizens may act upon the one conception of its requirements and the courts upon another." *Id.* at 393.

39. 402 U.S. 611 (1971).

40. *Id.*

exercise of the right of assembly to an unascertainable standard.[41] The Supreme Court noted that the term "annoying" is not vague merely because it is an imprecise term but, rather, it is vague since one may not know in advance what "annoys some people [but] does not annoy others."[42] Because a person of common intelligence could not reasonably predict what conduct is "annoying," the ordinance failed the first prong of the void for vagueness test.[43]

2. Second Prong: Clear Enforcement Standards

Perhaps more important than the "fair notice" prong is that the vagueness doctrine also requires a second prong, providing explicit standards for law enforcement. This prong requires that a legislature establish minimal guidelines to govern law enforcement.[44] Thus, if a statute, by its terms, encourages or allows arbitrary or discriminatory enforcement, it will be held to be void for vagueness.[45]

Kolender v. Lawson[46] involved a California statute that required persons who loiter or wander on the streets to identify themselves and to account for their presence when requested by a peace officer.[47] Appellee Lawson had been detained or arrested on approximately fifteen occasions pursuant to this statute.[48] Lawson challenged the validity of the statute through a civil action seeking a declaratory judgment that the statute was unconstitutional, a mandatory injunction to restrain the enforcement of the statute, and compensatory and punitive damages against the various officers who had detained him.[49] The Court specifically recognized that it is important for a legislature to establish minimum guidelines for law enforcement officers to follow when enforcing a criminal statute or ordinance.[50] The Court, in striking down the California statute, stated that

> as presently drafted and construed by the state courts, [the statute] contains no standard for determining what a suspect has to do in order to satisfy the requirements to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands

41. *Id.* at 614.
42. *Id.*
43. *Id.*
44. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).
45. *Id.*
46. 461 U.S. 352 (1983).
47. *Id.*
48. *Id.* at 354.
49. *Id.*
50. *Id.* at 358.

> of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way . . . .[51]

Although the Court recognized that states need stronger law enforcement tools, it was unwilling to justify legislation that failed to meet constitutional standards for definiteness and clarity.[52] At the heart of the Court's decision was its concern that such a standardless statute could easily furnish a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[53] Since the statute, on its face, did not establish standards by which the officer may determine whether the suspect complied with the identification requirement, the statute failed under the second prong of the void for vagueness test.[54]

Over the past fifty years, many loitering ordinances have been declared unconstitutional on the grounds that they are overly vague or vest too much discretion in the hands of the police.[55] Nevertheless, legislatures continue to enact ordinances prohibiting loitering. Often, these ordinances are enacted with the additional requirement of a specific intent to solicit or engage in criminal conduct.[56] By adding this requirement, the legislature hopes that this *mens rea* element will breathe constitutional legitimacy into an otherwise vague statute or ordinance.[57] In drafting such a loitering ordinance, it is important that the legislature narrowly tailor the statute and specify objective ways by which a police officer may distinguish between a lawful act, such as standing on a street corner, and a lawful act done for an evil purpose, such as standing on a street corner for the purpose of soliciting illegal drugs. The statute or ordinance, therefore, must provide objective guidelines to police officers, judges, and juries on which to base such a distinction. Absent these guidelines, police officers would be free to arbitrarily or indiscriminately decide whether a particular act is punishable.

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51. *Id.*

52. *Id.* at 361.

53. *Id.* at 360 (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972)).

54. *Id.* at 361.

55. *See* People v. Gibson, 521 P.2d 774 (Colo. 1974); Arnold v. City and County of Denver, 464 P.2d 515 (Colo. 1970); *In re* Doe, 513 P.2d 1385 (Haw. 1973); State v. Aucoin, 278 A.2d 395 (Me. 1971); Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. 1967).

56. This "specific intent" requirement is often referred to by courts as a *mens rea* requirement. *Mens rea* is defined as "a guilty mind; a guilty or wrongful purpose; a criminal intent." BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

57. *See* Pamela Sirkin, Comment, *The Evanescent Actus Reus Requirement: California Penal Code § 647(d) — Criminal Liability for "Loitering with Intent. . ." is Punishment for Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165 (1990); *see also* State v. Sawyer, 346 So. 2d 1071, 1074 (Fla. Dist. Ct. App. 1977) (upholding a Dade County loitering ordinance on the ground that a specific criminal intent is written into the ordinance).

Additionally, statutes or ordinances lacking such guidelines may delegate to the judiciary the formidable task of determining which conduct should be criminalized and which should not. This task, however, is best left for the legislature.[58]

B. Challenging Ohio's Anti-Drug Loitering Ordinances Under the Void For Vagueness Doctrine

1. First Prong Challenges

In Ohio, anti-drug loitering ordinances have been attacked on the ground that they violate the first prong of the void for vagueness doctrine.[59] It is contended that these ordinances lack an ascertainable standard of guilt to provide "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ."[60] For example, Dayton's Ordinance 28107 and Akron's Ordinance 519-1989 both prohibit an individual's presence in a public place under circumstances "manifesting" the purpose to engage in illegal drug activity.[61] The ordinances also indicate certain circumstances that police officers may take into consideration in determining whether such a "manifestation" can be inferred.[62] These circumstances, however, often articulate purely innocent acts.[63] For example, a citizen who is unfortunate enough to live in a high crime area, and who converses with or approaches another individual in his or her car, could be subject to arrest under the Akron ordinance.[64] As argued by the defendant in *Dayton v. Robinson*,[65] "it is unreasonable to assume that a person engaging in such innocent conduct could have fair notice that the ordinance would proscribe such acts."[66]

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58. United States v. Reese, 92 U.S. 214 (1876). "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large." *Id.* at 221. For commentary on the void for vagueness doctrine, see Anthony G. Amsterdam, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. (1960).

59. *See* Palmer v. City of Euclid, 402 U.S. 544 (1971); City of Akron v. Rowland, C.A. No. 15307, 1992 Ohio App. LEXIS 1870 (9th App. Dist. Apr. 8, 1992); City of Dayton v. Robinson, No. 91-CRB-5651 (Ohio Mun. Ct. 1991).

60. *Palmer*, 402 U.S. at 545 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

61. *See supra* notes 18-20 for relevant text of these ordinances.

62. *See supra* notes 18-20.

63. *See supra* notes 18-20.

64. Akron, Ohio, Ordinance 519-1989 (June 26, 1989).

65. Denial of Defendant's Motion to Dismiss at 4, City of Dayton v. Robinson, No. 91-CRB-5651 (Ohio Mun. Ct. filed Dec. 24, 1991) (on file with the *University of Dayton Law Review*).

66. *Id.*

In *Papachristou v. City of Jacksonville,*[67] the United States Supreme Court considered a vagrancy ordinance that listed several broad categories of people considered to be vagrant for purposes of the law.[68] In striking down the Jacksonville vagrancy ordinance, the Court acknowledged that the ordinance criminalizes activities "which by modern standards are normally innocent."[69] The ordinance made it difficult, if not impossible, for citizens to recognize actions that may be subject to criminal penalties.[70] As such, the vagrancy ordinance was held to be void for vagueness in that it failed to provide potential offenders with adequate notice that their conduct was unlawful.[71] The rationale of *Papachristou* has been cited repeatedly by other courts evaluating loitering ordinances.[72]

The Ohio courts, however, have not been very sympathetic to such arguments. For example, in *Akron v. Holley,*[73] the Ohio Court of Appeals reviewed Akron's anti-drug loitering ordinance and declined to find the language employed in the ordinance unconstitutionally vague.[74] After spending considerable time defining the term "manifesting" as it is used within the statute, the *Holley* court finally adopted the approach utilized by the appellate division in *City of Akron v. Parrish.*[75]

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67. 405 U.S. 156 (1972).

68. *Id.* Jacksonville, Fla., Ordinance 26-57 provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gambling houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earning of their wives or minor children shall be deemed vagrants . . . .

Id. at 156-57 n.1 (quoting Jacksonville, Fla., Ordinance 26-57 (Sept. 29, 1989)).

69. *Id.* at 163. For example, the Court considered the act of "nightwalking" and stated: "[w]e know . . . from experience that sleepless people often walk at night, perhaps hopeful that sleep-inducing relaxation will result." *Id.* "Persons 'neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served' would literally embrace many members of golf and city clubs." *Id.* at 164.

70. *Id.* at 171.

71. *Id.*

72. *See, e.g.,* Kolender v. Lawson, 461 U.S. 352, 360-61 (1983); *United States ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1172-74 (2d Cir. 1974); Johnson v. Carson, 569 F. Supp. 974, 976 (M.D. Fla. 1983); Bullock v. City of Dallas, 281 S.E.2d 613, 615 (Ga. 1981); City of Milwaukee v. Wilson, 291 N.W.2d 452, 457 (Wis. 1980).

73. 557 N.E.2d 861 (Ohio Mun. Ct. 1989).

74. *Id.* at 867.

75. No. 10385 (9th App. Dist. March 10, 1982) (LEXIS, States library, Ohio file).

> The . . . interpretation is that in addition to a criminal purpose, a person must commit an overt act or a circumstance must be present before the crime is complete. This interpretation requires that a person loiter in a defined place, with the purpose of engaging in a

In *Parrish*, the defendant challenged an anti-prostitution loitering ordinance which contained the same basic features as the Akron anti-drug loitering ordinance. The *Parrish* court upheld the ordinance by interpreting it to require that an illegal purpose or intent—solicitation for prostitution—be present in addition to mere loitering.[76] Thus, the *Parrish* and *Holley* courts agreed that an actor's illegal purpose can only justify an arrest if it is manifested through an overt act.[77]

In *Akron v. Holley*,[78] the court discredited appellants' argument that the "list of circumstances" to be considered by police officers was vague in that the "circumstances" involved traditionally innocent conduct.[79] The court conceded that the "circumstances" may describe purely innocent acts, but the court also noted that such circumstances may be used by police officers to infer some sort of criminal intent on the part of the actor.[80] A violation of the ordinance occurs only when the actor has the requisite intent to engage in unlawful drug activity.[81] Thus, the actor is not punished for performing "innocent acts"; rather, the actor is punished if the prosecution establishes that the actor possessed the requisite intent.[82] Persons of ordinary intelligence need not guess at the applicability of the section; so long as they do not loiter for the proscribed purpose, they have not violated the ordinance. By requiring this element of intent, whether or not this intent is inferred by the "circumstances," the law provides notice to the ordinary citizen that such conduct is unlawful.[83]

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prohibited drug-related activity, *and* that the person's actions satisfy one of the circumstances under [Akron Ordinance 519-1989] or some other overt act or circumstance be present manifesting such purpose.

Holley, 557 N.E.2d at 865.

76. *Parrish*, No. 10385.

77. *Id.*; *see also Holley*, 557 N.E.2d at 861.

78. *Holley*, 557 N.E.2d at 861.

79. *Id.* at 864. The court specifically stated:

The eleven subparagraphs listed in [Akron Ordinance 519-1989] have no bearing on [whether Akron Ordinance 519-1989 is void for vagueness] as they are among the circumstances which *may* be considered in determining, whether such purpose is manifested . . . . A prosecution under [Akron Ordinance 519-1989] may suggest the use of any one, all or none of the "circumstances" under [Akron Ordinance 519-1989] and the question of the constitutionality of any separate subparagraph must await its application in a particular case.

Id.; *see also* Florida v. E.L., 595 So. 2d 981 (Fla. Dist. Ct. App. 1992) (citing *Akron v. Holley* and noting that the "list of circumstances" in the Sanford anti-drug loitering ordinance is not "mandatory or even all inclusive, but rather the list is only suggestive").

80. *Holley*, 557 N.E.2d at 865.

81. Akron, Ohio, Ordinance 519-1989 (June 26, 1989).

82. *Holley*, 557 N.E.2d at 867.

83. *Id.* The United States District Court for the Northern District of Ohio also had an opportunity to address this issue in Sheppard v. Akron, No. 90-CV-299 (N.D. Ohio) (Order filed May 17, 1991). Following the directive of the United States Supreme Court that, "[i]n evaluating

2. Second Prong Challenges

When challenging an anti-drug loitering ordinance under the second prong of the vagueness test, the challenger must be able to point to specific aspects of the ordinance that can be interpreted to afford police officers an undue amount of discretion.[84] An example of such a challenge occurred in *City of Dayton v. Robinson*.[85] In *Robinson*, defendant Linda Robinson was observed driving her vehicle in what was deemed a "high crime area" by the police.[86] Police stopped Robinson and questioned her to determine as to why she was in the area.[87] Subsequently, she was arrested and charged under Dayton's anti-drug loi-

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a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered," the District Court recognized the statutory interpretation given by the court in *Akron v. Holley*. *Id.* at 7 (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5, *reh'g denied*, 456 U.S. 950 (1982)).

As the District Court stated, "*Holley* is the only case which has interpreted [Akron's Ordinance 519-1989] and hence this interpretation is presently good law . . . . The ordinance is to be read, therefore, to prohibit loitering, coupled with a specific intent to engage in drug-related activity and certain objective manifestations of such intent . . . ." *Sheppard*, No. 90-CV-299, Order at 7. "The element of specific intent renders any vagueness challenge on fair notice grounds untenable." *Id.* at 11. According to the *Sheppard* court:

> [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Id. (quoting Screws v. United States, 325 U.S. 91, 101 (1944)); *see also Hoffman Estates*, 455 U.S. at 499 ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."); Colouti v. Franklin, 439 U.S. 379 (1979); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952). Thus, taken together, *Holley* and *Sheppard* stand for the proposition that a list of "innocent" circumstances within the ordinance by which police officers may or may not infer an unlawful intent on the part of the actor does not invalidate a loitering statute under the first prong of the void for vagueness doctrine.

A statute or ordinance that specifies such "circumstances" will not be invalidated unless the statute is interpreted to indicate that innocent behavior alone proves an unlawful intent. *Sheppard*, No. 90-CV-299, Order at 13 n.2; *see, e.g.*, Northern Va. Chapter ACLU v. City of Alexandria, 747 F. Supp. 324 (E.D. Va. 1990) (holding ordinance unconstitutionally overbroad when that ordinance did in fact criminalize the behavior described in the "guidelines" by providing that such behavior unequivocally manifests an unlawful intent). The *Holley/Sheppard* rationale was recently affirmed by an Ohio appeals court in City of Akron v. Rowland, No. 15307, 1992 Ohio App. LEXIS 1870 (9th App. Dist. Apr. 8, 1992).

84. *See generally*, Smith v. Goguen, 415 U.S. 566 (1974); United States v. Busacca, 739 F. Supp. 370 (N.D. Ohio 1990); United States v. Moyer, 713 F. Supp. 1035 (N.D. Ohio 1989).

85. No. 91-CRB-5651 (Ohio Mun. Ct. 1991).

86. Defendant's Motion to Dismiss at 2, City of Dayton v. Robinson, No. 91-CRB-5651 (Ohio Mun. Ct.) (motion filed Oct. 1, 1991).

87. *Id.*

tering ordinance.[88] At the heart of Robinson's argument was the fact that the ordinance[89] permits the officer to question the individual observed and discern whether or not the explanation is satisfactory.[90] As such, Robinson contended that "the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest."[91] Because the decision to arrest the citizen is based solely upon the adequacy of the explanation given to the officer, Robinson argued that the statute encourages arbitrary and discriminatory enforcement.[92]

In response to Robinson's arguments, the court stated that Dayton's Ordinance 28107 does no more than require the arresting officer to give a suspect the opportunity to explain his suspicious conduct:[93]

> The claim is that at this point the officer has the unfettered discretion to make an arrest based upon this accounting of ones [sic] suspicious conduct. That is not the case however, in this situation the officer has to merely re-evaluate whether there still exists a probable cause belief to arrest, by asking if the [sic] all the elements of the offense have been satisfied including the factors and circumstances manifesting intent. This process is no different then [sic] initially determining whether there exists probable cause without an explanation.[94]

As such, the provision does not delegate basic policy matter to the police or give rise to the danger of arbitrary or discriminatory enforcement.[95] By requiring an officer to allow the suspect an opportunity to explain his conduct prior to arrest, the suspect is given the opportunity to "clear up" any "misconceptions" that the arresting officer may have regarding his alleged illegal conduct.[96] In this sense, the "opportunity to explain" provision does no more than merely provide an additional procedural safeguard to the suspect.[97] For this reason, the second prong of the void for vagueness challenge fails.

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88. *Id.*; see *supra* notes 18-20 (quoting relevant text of Dayton, Ohio, Ordinance 28107).

89. *See supra* note 20 for relevant text of this ordinance.

90. Defendant's Motion to Dismiss at 5, City of Dayton v. Robinson, No. 91-CRB-5651.

91. *Id.* (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

92. Defendant's Motion to Dismiss at 5-6, City of Dayton v. Robinson, No. 91-CRB-5651.

93. Denial of Defendant's Motion to Dismiss at 8-9, City of Dayton v. Robinson, No. 91-CRB-5651 (Ohio Mun. Ct.) (filed Dec. 24, 1991).

94. *Id.*

95. *Id.* at 9. The "satisfactory explanation" provisions of anti-drug loitering ordinances may however bring up other Fourth and Fifth Amendment issues that are beyond the scope of this Comment.

96. *Id.*

97. *Id.* at 8.

C. *Overbreadth*

Overbreadth is a second constitutional theory used to challenge anti-drug loitering statutes. A statute is overbroad if it proscribes conduct protected by the First Amendment.[98] A statute or ordinance is impermissibly overbroad, even if the language is clear and precise, if it sweeps constitutionally protected First Amendment conduct within the perimeters of its prohibition.[99] The United States Supreme Court made a significant change in the overbreadth doctrine in the case of *Broadrick v. Oklahoma*.[100]

In *Broadrick,* state employees challenged Oklahoma statutory provisions which prohibited all civil service employees from engaging in political fund-raising, belonging to any political party committee, becoming an officer or member of any partisan political club, running for any paid public office, or taking part in the management or affairs of any political party "except to exercise [the] right [as citizens] privately to express . . . opinion[s] and vote."[101] Adopting a view expressed in two dissenting opinions in 1971[102] and 1972,[103] the *Broadrick* majority conceded that the language of the Oklahoma statute could reach such protected acts as wearing campaign buttons and displaying bumper stickers but held that such applications, although substantial in absolute number, were insubstantial when compared with the law's legitimate applications.[104] Under this new "substantial overbreadth" doctrine, the challenger must now put on evidence that the statute or

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98. The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I. The First Amendment was made applicable to the states in Gitlow v. New York, 268 U.S. 652 (1925).

99. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972) (anti-noise ordinance prohibiting a person while on grounds adjacent to a school from willfully making disruptive noises is not unconstitutionally overbroad since the expressive activity is prohibited only if it "materially disrupts class work"); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (provisions of the Civil Service Law and the Education Law, which make Communist Party membership, as such, *prima facie* evidence of disqualification for employment in public schools are overbroad and therefore unconstitutional); *see also* Zwickler v. Koota, 389 U.S. 241 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Thornhill v. Alabama, 310 U.S. 88 (1940).

100. 413 U.S. 601 (1973).

101. *Id.* at 606.

102. Coates v. City of Cincinnati, 402 U.S. 611, 617-21 (1971) (White, J., dissenting).

103. Gooding v. Wilson, 405 U.S. 518, 528-30 (1972) (Burger, C.J., dissenting).

104. *Broadrick*, 413 U.S. at 609-18. The Court stated:

> [W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Id. at 615-16.

ordinance contains unconstitutional applications that clearly outweigh the constitutional applications.[105]

Following *Broadrick*, a major component of a successful overbreadth challenge is a *prima facie* showing that the challenged statute or ordinance primarily regulates First Amendment activity. If the challenged statute only "incidentally" interferes with First Amendment activity, then it will most likely survive the challenge.[106] Thus, in the context of anti-drug loitering ordinances, the challenger must establish that the ordinance serves to punish otherwise protected First Amendment activities—expression or association rights—and that such infringements exceed its primary social purpose—to discourage criminal drug activity on the streets.[107]

1. Challenging Anti-drug Loitering Ordinances Under the Overbreadth Doctrine

When challenging an anti-drug loitering ordinance, an individual must stress the fact that the ordinance has a "chilling effect" upon an his right to freely associate and assemble. Such a challenge becomes especially strong when a "high crime area" is involved. For example, Akron's anti-drug ordinance[108] takes into consideration whether the "area involved is by public repute known to be an area of unlawful drug use and trafficking" along with whether "[s]uch person is a known unlawful drug user, possessor, or seller."[109] The ordinance, therefore, works to restrict a visitor or a resident of a "high crime/drug area" from freely associating with others simply because the neighborhood has a reputation. Likewise, an adjudicated "drug user, possessor, or seller" is foreclosed from enjoying the same First Amendment protections as his or her peers.

In *City of Dayton v. Robinson,*[110] Robinson made the argument that Dayton's Ordinance 28107 has a significant chilling effect upon an individual's right to freely associate and assemble with her peers should she be unfortunate enough to live in what the Dayton Police Depart-

105. *Id.*

106. For example, in New York v. Ferber, 458 U.S. 747 (1982), the court rejected an overbreadth challenge to New York State's law which prohibits a person from promoting "sexual performances" by children under age 16 through the distribution of material depicting such performances. *Id.* In *Ferber*, the Court, following the *Broadrick* rationale, refused to invalidate the New York statute since the statute only very minimally infringed on a person's First Amendment rights. *Id.* at 773. Any "chill" on protected conduct is far outweighed by the societal benefits of prohibiting child pornography. *Id.*

107. *See generally* Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

108. Akron, Ohio, Ordinance 519-1989 (June 26, 1989).

109. *Id.*; *see supra* note 19.

110. No. 91-CRB-5651 (Ohio Mun. Ct. 1991).

ment classifies as a "high crime area."[111] Robinson argued the statute was overbroad because "[Ordinance 28107] operates to inhibit the most basic of our First Amendment freedoms.[112]

Such arguments, however, have not been readily accepted by the Ohio courts.[113] These courts articulate two main reasons for rejecting such arguments.[114] First, the ordinance does not serve to prohibit individuals from associating with others in high crime areas, rather, it merely prohibits such conduct when the actor *intends* to engage in illegal activity.[115] The fact that an area has the reputation of being a high crime/drug area is just one of the circumstances that the officer may weigh in determining whether the actor has the requisite intent to commit the proscribed conduct.[116] Second, the conduct proscribed by the ordinance serves no communicative function and, thus, the conduct is not protected by the First Amendment.[117] For example, the First Amendment does not recognize a right to freely associate with others with the intent to engage in unlawful activity.

The United States District Court, in *Sheppard v. Akron*,[118] adopted this type of exclusion to the guarantee of freedom of association.[119] Sheppard was arrested for violating Akron's anti-drug loitering ordinance, Akron Ordinance 519-1989.[120] He and others filed suit in the federal district court alleging, *inter alia*, that Ordinance 519-1989

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111. Defendant's Motion to Dismiss at 7, City of Dayton v. Robinson, No. 91-CRB-5651 (Ohio Mun. Ct.) (motion filed Oct. 1, 1991). A citizen's right to freely assemble and associate with her peers has been recognized by the Supreme Court to apply in a social context. *See, e.g.*, Healy v. James, 408 U.S. 169, 181 (1972) (although freedom of association is not explicitly enumerated in the First Amendment, the right is implicitly part of the First Amendment guarantees); Evans v. Newton, 382 U.S. 296, 302 (1966); Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

112. Defendant's Motion to Dismiss at 8, City of Dayton v. Robinson, No. 91-CRB-5651.

113. *See, e.g.*, Sheppard v. Akron, No. 90-CV-299 (N.D. Ohio) (Order filed May 17, 1991); *Robinson*, No. 91-CRB-5651.

114. *Sheppard*, No. 90-CV-299; City of Akron v. Rowland, C.A. No. 15307, 1992 Ohio App. LEXIS 1870 (9th App. Dist. Apr. 8, 1992); *Robinson*, No. 91-CRB-5651; City of Akron v. Holley, 557 N.E.2d 861 (Ohio Mun. Ct. 1989); *see also* City of Toledo v. Townsend, No. L-81-115 (6th App. Dist. Sept. 25, 1981) (LEXIS, States library, Ohio file) (anti-prostitution loitering ordinance held not overbroad); City of Cleveland v. Howard, 532 N.E.2d 1325, 1331 (Ohio Mun. Ct. 1987) (anti-prostitution loitering ordinance held not overbroad).

115. *Howard*, 532 N.E.2d at 1329.

116. *Holley*, 557 N.E.2d at 864.

117. In *Chaplinsky v. New Hampshire*, the Supreme Court recognized that rights inherent in the First Amendment are not absolute at all times and under all circumstances. 315 U.S. 568, 571 (1942). As Justice Holmes stated in *Schenck v. United States*, the First Amendment does not protect "a man from falsely shouting fire in a theater and causing a panic." 249 U.S. 47, 52 (1919).

118. No. 90-CV-299 (N.D. Ohio) (Order filed May 17, 1991).

119. *Id.*

120. *Id.*

was facially unconstitutional in that it was overbroad.[121] The court rejected this claim and specifically stated that Ordinance 519-1989 is not a proscription of free speech or expression within the meaning of the First Amendment.[122] As such, the ordinance is not overbroad for the simple reason that the ordinance does not prohibit any constitutionally protected activity.[123] Of extreme importance in this determination was the fact that the ordinance required the specific element of intent to engage in illegal drug-related activity.[124] The element of intent "cures any overbreadth infirmities the [plain loitering] statute might otherwise have."[125]

Because courts have not recognized "loitering with the intent to engage in unlawful activity" as protected First Amendment conduct, overbreadth challenges are likely to fail. Although most of the actions involved in loitering may be protected under the First Amendment's freedom of association, the "intent to engage in unlawful activity" is not protected. As such, the ordinance cannot be said to proscribe pro-

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121. *Id.*

122. *Id.* at 8.

123. *Id.* at 5.

124. *Id.*

125. *Id. at* 6. In classifying the proscribed conduct of Akron's Ordinance as being outside the realm of constitutional protection, the court stated:

> [Akron Ordinance 519-1989], clearly, is not directed at the communication of opinions or ideas, but rather at conduct which serves no communicative function. The ordinance is worded and has been interpreted as not to infringe upon legitimate rights of free expression. It is not concerned with the content of such expression, but rather with actions which have as their intent engaging in illegal drug activity. Simply put, the conduct prohibited by [Akron's Ordinance 519-1989] belongs to a category of expression which is 'no essential part of any exposition of ideas,' and is of no social value whatsoever.

Id. at 8 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); *see also* Akron v. Rowland, 1992 Ohio App. LEXIS 1870 (1992) (agreeing with *Sheppard* court that the specific intent to engage in drug-related activity "cures any overbreadth infirmities").

A similar overbreadth challenge arose in Cleveland v. Howard, 532 N.E.2d 1325 (Ohio Mun. Ct. 1987). In this case, however, the overbreadth challenge was levied at Cleveland's anti-prostitution loitering ordinance. *Id.* at 1326-27. Section 619.11 is remarkably similar to the anti-drug loitering ordinance. The ordinance states in part:

> No person shall remain or wander in a public place and repeatedly beckon to, or repeatedly attempt to engage passersby in conversation, or repeatedly stop or attempt to stop motor vehicles, or repeatedly interfere with the free passage of other persons for the purpose of engaging in soliciting or procuring sexual activity for hire.

Id. at 1326 (quoting CLEVELAND, OHIO, CODIFIED ORDINANCE § 619.11). In rejecting the overbreadth challenge the court noted that the statute at issue did not "impermissibly sweep 'within its prohibitions what may not be punished under the First and Fourteenth amendments.'" *Id.* at 1328 (quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972)). "[T]he statute, by its terms, is limited to conduct 'for the purpose of prostitution' — behavior which has never been a form of constitutionally protected free speech." *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); Colton v. Kentucky, 407 U.S. 104, 111 (1972); Shuttleworth v. Birmingham, 382 U.S. 87, 91 (1965)).

tected activity. Without a substantial amount of First Amendment activity being jeopardized, the overbreadth doctrine is inapplicable. Moreover, given the high burden that a challenger must meet, even a substantial First Amendment infringement may not be enough to sustain a challenge.[126]

D. Law Enforcement Implications

Although neither the United States Supreme Court nor the Ohio Supreme Court has explicitly ruled upon the constitutionality of Ohio's anti-drug loitering ordinances, such ordinances have survived attacks at the lower levels.[127] The anti-drug loitering ordinances survive, however, only because courts have interpreted them so as to avoid a vague or overbroad construction.[128] As such, these interpretations must control when local municipalities enforce the ordinances. In other words, law enforcement officers cannot ignore the constitutional limitations that courts have placed upon the ordinance. If an officer chooses to overstep the specified limitations of the ordinance, the arrest may not be valid. The two main statutory interpretations that law enforcement officers need to recognize with regard to anti-drug ordinances concern the intent requirement and the satisfactory explanation provisions.

1. Intent Requirement

Of paramount importance in upholding anti-drug loitering legislation against vagueness and overbreadth challenges is the dual requirement that an overt act accompany the intent to engage in unlawful drug activity.[129] The intent requirement, however, normally does not appear on the face of anti-drug loitering ordinances. Consequently, courts have inferred an intent requirement in order to combat the constitutional challenges that would have been successful absent the requirement.[130]

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126. *See supra* notes 98-107 and accompanying text.

127. *See supra* notes 59-97, 108-126 and accompanying text.

128. *See supra* notes 59-97, 108-26 and accompanying text.

129. *See supra* notes 73-83, 115-125 and accompanying text.

130. *See, e.g.*, Akron v. Holley, 557 N.E.2d 861 (Ohio Mun. Ct. 1989). In *Holley*, the Akron Municipal Court interpreted the words "manifesting the purpose to engage in drug-related activity" as requiring a specific criminal intent on the part of the actor. *Id.* at 865-66; *see supra* notes 73-83 and accompanying text. This approach was subsequently followed by other Ohio courts. *See* City of Dayton v. Robinson, No. 91-CRB-5651 (Ohio Mun. Ct. 1991); *see also* City of Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992). *Luvene* involved both a void for vagueness and an overbreadth attack on the Tacoma anti-drug loitering ordinance. Tacoma, Wash., Ordinance 24167 (Aug. 16, 1988). The key portions of the Tacoma ordinance are identical to those of the Akron, Ohio, anti-drug loitering ordinance upheld in *Holley*. The Tacoma ordinance states: "It is unlawful for any person to loiter in or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances *manifesting* the *purpose* to

As to what this intent requirement means in terms of law enforcement is open to speculation. As with any inchoate offense, it is often troublesome for law enforcement officials to determine whether the requisite intent exists such that a valid arrest may be made. It is safe to say, however, that the *actus reus* element of the offense must be highly indicative of the actor's intent to commit a specific crime. Some degree of intent must be inferred from the conduct of the actor.

As a means of providing law enforcement officers with some degree of guidance as to what sort of conduct will provide support for an intent inference, local legislatures often include a "list of circumstances" that "may be considered." If a "circumstance" listed within the ordinance is interpreted, by itself, to be sufficient individually to manifest the prohibited intent, then the law would be overbroad because it would deter a broad range of constitutionally protected activity.[131] If the ordinance is judicially interpreted, however, so that any factor on the list of circumstances "may be considered" in determining whether a violation occurred, a police officer will have the discretion to decide whether the actor possesses the requisite "intent." The arresting officer must be able to articulate specific facts which taken together with rational inferences from those facts, reasonably illustrate that the actor possesses the intent to engage in unlawful drug activity. Under such a judicial interpretation, the list would only provide examples of behavior that *might* be considered evidence of a violation of the law. This seems to be the view taken by the Ohio courts.[132]

It is important to note, however, that when police possess the type of wide discretion provided under general loitering laws, the likelihood of abuse increases. The reasons for this abuse range from lack of proper training and guidance in assessing suspicious circumstances,[133]

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engage in drug related activity. . . ." (emphasis added). The Tacoma ordinance then gives a list of ten "circumstances which may be considered" to determine if the "purpose" to engage in illegal drug activity is "manifested." *Id.* The Supreme Court of Washington interpreted the Tacoma ordinance so as to require both intent (*mens rea*) and an overt act. *Luvene*, 827 P.2d at 1383-84. In doing so, the court construed the phrase "purpose to engage in drug activity" as requiring a specific mental state, or intent. *Id.* at 1383. Moreover, the term "manifesting" was construed so as to require some sort of overt conduct to occur while loitering, so as to determine whether a person possesses the requisite intent to engage in drug activity. *Id.* at 1383-84. As the Washington Court stated, "it is critical that the culpable mental state coexist with identifiable, articulable conduct reasonably consistent with the intent to buy, sell or use illegal drugs. Otherwise, the ordinance does not distinguish between the innocent intent to merely loiter and the culpable intent to engage in unlawful drug-related activity." *Id.*

131. *See supra* notes 98-107 and accompanying text; Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

132. *See supra* notes 78-83 and accompanying text.

133. LAWRENCE P. TIFFANY ET AL., DETENTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 38-43 (1967); WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY 155-60

to isolation from the community,[134] to prejudices developed while on the police force.[135] As a consequence, it is important that local officials, legislatures, and courts continuously "check" the discretion given to police officers. To be valid, every arrest made under an anti-drug loitering ordinance must be predicated on an articulable set of circumstances or acts from which an officer can reasonably infer the requisite intent.

2. Satisfactory Explanation Provisions

A second set of provisions in anti-drug loitering ordinances that law enforcement officials should be concerned about are the "satisfactory explanation" provisions.[136] In Ohio, courts have treated the satisfactory explanation provisions as a procedural aspect of the loitering offenses.[137] According to this interpretation, law enforcement officials must follow this procedure for the subsequent prosecution to succeed. This requirement is not a substantive factor in what constitutes the offense; rather, it is merely a procedural condition that provides the suspect with an opportunity to explain the allegedly suspicious conduct. Because courts do not view this provision as a substantive part of the offense, an arrest cannot be predicated on a suspect's refusal to answer.[138] It follows, therefore, that where there is no basis for a reasonable suspicion prior to police questioning, the arresting officer cannot use one's "silence" or "failure to comply" as an act or circumstance to infer intent.[139] Thus, with regard to law enforcement, it is important that

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(1970); Dan Stormer and Paul Bernstein, *The Impact of* Kolender v. Lawson *on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L.Q. 105, 112 (1984).

134. Jerome H. Skolnick, *A Sketch of the Policeman's "Working Personality," in* CRIMINAL JUSTICE: LAW AND POLITICS 107, 112-14 (George F. Cole ed., 4th ed. 1984).

135. WESTLEY, *supra* note 133, at 160-65; Stormer and Bernstein, *supra* note 133, at 114.

136. *See supra* note 20 (example of "satisfactory explanation" provision).

137. *See supra* notes 84-97 and accompanying text.

138. It is important to recognize that a statute or ordinance that would *require* an individual to provide law enforcement officers with an explanation as to such individual's presence or conduct would create an inevitable conflict with the right to be free from self-incrimination. The Fifth Amendment to the United States Constitution states in part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. A person has the right to remain silent and not incriminate himself. *See* Miranda v. Arizona, 384 U.S. 436 (1966). As the United States Supreme Court has recognized, a suspect may not be forced to answer a police officer's question nor may a failure to answer be an independent basis for arrest. *See* Terry v. Ohio, 392 U.S. 1, 34 (1967) (White, J., concurring).

139. *See supra* notes 78-97 and accompanying text. Had the courts failed to recognize the provision as procedural, law enforcement officials would be, in effect, authorized to decide on their own whether the response was satisfactory or not. Such a decision would provide the officer with an undue amount of discretion and would violate the second prong of the vagueness doctrine. *See supra* notes 44-58 and accompanying text. Likewise, a situation would be created in which the individual is unaware as to what would constitute a reasonable or satisfactory explanation. Forcing a person to guess as to whether the response will satisfy a police officer would be violative of the "fair notice" prong of the vagueness doctrine. *See supra* notes 37-43 and accompanying text.

the procedural and substantive aspects of the offense are distinguished. An arrest under an anti-drug loitering ordinance cannot be valid unless the substantive elements of the offense are met. Silence or failure to comply with the police officer's request for an explanation will not substitute for the intent element of an otherwise unjustified stop.

IV. CONCLUSION

When sufficiently limited in scope, anti-drug loitering ordinances can be a useful law enforcement tool. When such ordinances are not carefully drafted, interpreted, or enforced, however, they can be used in a discriminatory or arbitrary fashion. Thus, when drafting, interpreting, and enforcing these ordinances, legislators, courts, and law enforcement officials must be careful to recognize and stay within constitutional limitations.

Laws that prohibit loitering with the intent to engage in a specific illegal purpose, such as drug activity or prostitution, are almost certain to survive constitutional scrutiny. The *mens rea* or scienter element provides courts with a strong basis upon which to uphold the constitutionality of ordinances against vagueness and overbreadth challenges. The questions that are most likely to arise under these laws are apt to pertain to the existence of probable cause to arrest or the existence of discriminatory application of the law for a particular case, rather than the facial constitutionality of the statute itself.

In order to effectively take advantage of anti-drug loitering ordinances as a means of combating the drug problem in the streets, law enforcement officials must recognize the constitutional limitations that have been placed upon them by such ordinances. If police officers are afforded unlimited power or discretion to arrest those whose conduct may be deemed "suspicious," it is unlikely that the courts will continue to validate such legislation.

Rene M. LaForte